

Andreea-Teodora STĂNESCU
INTERNATIONAL CUSTOM FORMATION. SYNTHESIS OF
TRADITIONAL THEORIES

Abstract

The two elements of custom: usage "the material and detectable element" and opinio iuris, the "immaterial and psychological element" have been offered by François Geny. These two elements form the core of traditional theories concerning custom formation and thus the object of analysis in the present study. The first part approaches the material element of the custom, emphasising different views regarding its four requirements: duration, repetition, continuity generality and uniformity. The second part approaches the psychological element of the custom through the most important theories concerning it: the error hypothesis, the consent, acquiescence and lack of protest hypothesis.

Key words: custom, sources of public international law, usage, opinio iuris

Introduction

Sources of public international law and among these, especially from the 19th century, custom has been more and more in the attention of the writers on international law. Prior to that century, as Professor D'Amato asserts in his study "The Concept of Custom In International Law", no author has addressed himself to the details of custom-formation.

The first steps in inquiring the process of formation of international customary law were taken by Puchta and Savigny, in the 19th century. They showed that customary law has a psychological¹⁾ aspect and thus a need for a reconciliation of the psychological and the overt elements of custom appeared.

It was François Geny who provided the synthesis in his "Methode d'interpretation et sources en droit prive positif", published in 1899. He offered two elements of custom: usage (repeated practices) and *opinio iuris sive necessitatis*, meaning that the usage must amount to the "exercise of a (subjective)

¹ Puchta, Das Gewohnheitsrecht (1828); Savigny, Vom Benef Unserer Zeit fur Gesetzgebung (1840) in A. A. D'Amato, The Concept of Custom in the International Law, Cornell University Press, 1971, p. 48.

right of those who practice it". Usage is "the material and detectable element" in custom and *opinio iuris*, the "immaterial and psychological element"¹).

These two elements of custom passed immediately into international legal thinking, both the Statute of the Permanent Court of Justice (1919) and the Statute of the International Court of Justice embody this doctrine in their article 38 which, referring to custom, reads as follows: "the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: ...international custom, as evidence of a general practice accepted as law". But the scholars² have given different interpretations of each element and of the relation between usage and *opinio iuris*.

1. The Material Element

In the traditional views, the requirements for the material element of the custom (usage), though not entirely separate from one another, are duration, repetition, continuity and generality.

1.1 Duration

Duration - the temporal element - covers the broadest possible range in traditional writings, from³ the "immemorial custom" of the classicists to the "single act" theories of some contemporary writers. The literature contains no standards or criteria for determining how much time is necessary to create a usage that can be qualified as international customary law. Even so, the time factor cannot be ignored. The establishment of custom required a long time in the past when international life was slower and communication primitive, but today custom may be formed rapidly since "every event of international importance is universally and immediately known"⁴). This argument suggests a communication factor in custom, reminiscence of Mateescu's observation

¹ Gény, *Méthode d'interprétation et sources en droit privé positif* (1899) in D'Amato, *The Concept of Custom in the International Law*, Cornell University Press, 1971, p. 49.

² R. Miga-Bestelie, *Drept internațional public*, vol. 1, București, Ed. All Beck, București, 2005, p. 68-74, A.. Bolintineanu, A. Năstase, B. Aurescu, *Drept internațional contemporan*, Ed. All Beck, București, 2000, p. 49-52.

³ Plucknett, *A Concise History of the Common Law*, (1956) in A.A. D'Amato, *The Concept of Custom in the International Law*, Cornell University Press, 1971, p. 56-7.

⁴ K. Wolfke, *Custom and Present International Law*, Kluwer Academic Publishers, 1993, p. 59-61.

regarding the need for a custom to be "notorious"¹⁾ in order to be valid. So, the idea of communication or notice may be more basic to custom than the mere fact of duration.

1.2 Repetition/ Density

Repetition or the density of the usage is more significant than the temporal factor²⁾, but duration cannot be separated from density since both serve to call attention to the overt acts making up usage.

1.3 Continuity

Continuity of the practice no longer holds good³⁾. Interruption often prevents the formation of a custom but this does not mean that every break should lead to such consequence. On the contrary, returning to the same practice after the interruption may sometimes help establish a new rule of customary law.

These requirements should be different tackled as one is referring to non-acts forming practice. The majority of authors agree that custom can arise as a result of abstention⁴⁾. M. Sørensen demonstrated the relative character of abstention⁵⁾. According to him, abstention is often a result of a positive decision or an action, the decision process of an administrative authority.

As concerns the role of the non-acts to custom formation one may identify two basic types of non-acts having different results in the process. On the one hand, there is a discretionary non-action, a failure to act because of choice or technological incapacity which has no legal consequence. On the other hand, there is an obligatory negative practice, a failure to act because of a legal duty not to act, which leads towards a different solution.

¹ Mateesco, *La coutume dans les cycles juridiques internationaux* (1947) in A. A. D'Amato, *The Concept of Custom in the International Law*, Cornell University Press, 1971, p. 56-57.

² Waldock, *Generale Course of Public International Law* (1962) in A. A. D'Amato, *The Concept of Custom in the International Law*, Cornell University Press, 1971, p. 59.

³ K. Wolfke, *Custom and Present International Law*, Kluwer Academic Publishers, 1993, p. 60.

⁴ K. Wolfke, *Custom and Present International Law*, Kluwer Academic Publishers, 1993, p. 61.

⁵ Sørensen, *Les sources du droit international* (1946) in K. Wolfke, *Custom and Present International Law*, Kluwer Academic Publishers, 1993, p. 61.

1.4 Generality

Generality of the custom has been seen by the writers either as a broad general participation¹⁾ or as a participation of those countries that hitherto had an opportunity to apply the practice in question. Neither of these groups denies that limited participation creates legal precedent, but there was judge De Visscher who suggested, referring to Cobbett's analogy, that some users will "mark the soil more deeply with their footprints than others ... because of their weight"²⁾. The idea that the participation of the major powers in a usage should be regarded as more significant than the one of small states was reiterated by W. Bishop.

On the bases of the principle of legal equality of all states, a theory has been developed requiring a certain degree of representativeness of the practice³⁾. The criterion is, in a sense, qualitative rather than quantitative, which means the question is not how many states participate in a practice, but which ones. Still, one should add that the weight of one state practice in the formation of a customary rule does not depend on the power of the state. In the words of ICJ, in the North Sea Continental Shelf cases, the practice must include that of states whose interests are specially affected: "(...) it was indispensable that state practice (...), including that of states whose interests were specially affected, should have been both extensive and virtually uniform (...)" (ICJ Reports 1969, p.43)

Who is "specially affected" will vary according to circumstances. There is no rule that major powers have to participate in a practice in order for it to become a rule of general customary law. Still, given the scope of their interests, both geographically and *ratione materiae*, they often will be "specially affected" by a practice; and to that extent and to that extent only, their participation is necessary. We may conclude that for a rule of general customary international law to come into existence, it is not necessary for the state practice to be universal, but to be general, which means to be both extensive and representative.

¹ Kunz, *The Nature of Customary International Law* (1953) in A. A. D'Amato, *The Concept of Custom in the International Law*, Cornell University Press, 1971, p. 64.

² De Visscher, *Theory and Reality in Public International Law* (1957) in A. A. D'Amato, *The Concept of Custom in the International Law*, Cornell University Press, 1971, p. 65.

³ Final Report of the Committee on Formation of Customary General International Law of the International Law Association - London Conference (2000), p. 23-26.

1.5 Uniformity

As it was pointed in the international law doctrine, for a state practice to create a rule of customary law, it must be virtually uniform, both internally and collectively¹. "Internal" uniformity means that the behaviour of one state, considered as custom-formative should be virtually the same. "Collective" uniformity means that different states must not have substantially different conduct as concerns the practice in question.

2 The Psychological Element

As regards the second element of the custom, the psychological element, one may find several sets of theories². A reason for this may be the apparent chronological paradox³ involved by the traditional bipartite conception of customary law. The states creating new customary rules must believe that those rules already exist, and their practice, therefore, is in accordance with law. This requirement would seem to make the development of a new customary rule impossible. This paradox led Kelsen and Guggenheim to conclude that *opinio iuris* is nothing but a pseudo-element that allows judges to exercise wide discretion in their analyses of state practice and thus, both authors abandoned this position.

2.1 The Error Hypothesis

The first set of theories⁴ relates to the circularity of *opinio iuris*. The idea suggested by Geny and Kelsen as one possible response to the chronological paradox is the keystone of these theories. They argued that for a new rule of customary law, the relevant actors must erroneously believe that they are already bound by that rule. The error hypothesis had been rejected. The reasons for this

¹ Final Report of the Committee on Formation of Customary General International Law of the International Law Association - London Conference (2000), p. 21-23.

² A.A. D'Amato, *The Concept of Custom in the International Law*, Cornell University Press, 1971, p. 66-72.

³ M. Byers, *Custom, Power and the Power of Rules*. International Relations and Customary Law, Cambridge University Press, 1999, p. 130-133.

⁴ A. A. D'Amato, *The Concept of Custom in The International Law*, Cornell University Press, 1971, p. 66-72; 187-215.

may be the fact that a mistake of this nature can not turn nonexistent law into positive law and even the fact that is difficult to imagine that all states participating in custom formation were erroneously advised by their legal counsel as concerns the requirements of prior international law, especially since states themselves ultimately decide the content of international law.

2.2 The Consent, Acquiescence or Lack of Protest Hypothesis

A second group of theories would equate *opinio iuris* with consent, acquiescence or lack of protest. This school of thought considers that a state is not "bound" by a rule of international law unless it has previously "consented" to that rule. This is a form of the positivist tradition and it requires for a rule to bind an individual state express or implied consent or acquiescence to it. The procedure of consensus¹ involves an acceptance of a practice as law, acceptance that can be either express, by means of express declaration or tacit, by means of a presumption based upon various kinds of active or passive reactions to the practice by the interested states. In order to mask some of the difficulties that a term like consent might raise, the doctrine has created² the concept of "acquiescence".

Even sometimes it is not easy to distinguish between consent and acquiescence, especially between implied consent and acquiescence, some writers have attempted to do that by expanding the latter notion to cover situations falling short of implied consent. MacGibbon defined it as "silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection"³. So, in international relations one may find state practice requiring an expression of protest on behalf of the states concerned or state practice not requiring such kind of behaviour. If the lack of protest in the first situation is acquiescence as concerns a certain rule, in the second one we may speak of tacit consent.

¹ K. Wolfke, Custom and Present International Law, Kluwer Academic Publishers, 1993, p. 62-63.

² A. A. D'Amato, The Concept of Custom in the International Law, Cornell University Press, 1971, p. 195-215.

³ MacGibbon, The Scope of Acquiescence in International Law (1954) in A. A. D'Amato, The Concept of Custom in the International Law, Cornell University Press, 1971, p. 195.

On the basis of this theory, Brigitte Stern developed a theory saying that *opinio iuris* constitutes state will, and the meeting of such wills as manifest through state practice is the immediate cause of legal obligations. The contents of each will depend on the power situation existing at any particular time within the international order. The first states contributing to the birth of a customary rule manifest a free will, a "volonté libre". The other states, the silent majority, manifest wills that are conditioned by the irresistible wills of the first states. The result is the adoption of a rule by "consensus", that is to say, without express manifestation of either positive or negative will, but rather a simple tacit manifestation¹.

Another important issue is the one about the persistent objectors². If a certain pattern of practice is emerging or have emerged, states may wish to diverge or dissent from it. A persistent objecting state is not bound by the eventual customary rule if the objections are maintained from the early stages of the rule onwards, up to its formation and beyond, and they are consistently. In the second situation, that of a state dissenting from a customary rule after its formation, the main rule is that a general customary rule is binding on all states and can not be the subject of any right of unilateral exclusion, exercisable at will by anyone of the members of international community in its own favour. Still, in cases of a large number of subsequent objectors, their behaviour, even if it amounts to breaches of obligations, may lead to desuetude or the modification of the rule.

One may criticize this theory saying that a failure to protest doesn't always mean a consent or acquiescence on behalf of the state concerned³. It might be governed by political or diplomatic considerations (including often-realistic sense of the futility of protest) or even might be a way to prevent the establishment of the usage's notoriety (especially when a protesting state is not directly involved in an action or practice).

¹ Stern, *La coutume au coeur du droit international* (1981) in M. Byers, *Custom, Power and the Power of Rules. International Relations and Customary Law*, Cambridge University Press, 1999, p 131-132.

² K. Villinger, *Customary International Law and Treaties. A manual on the Theory and Practice of Interrelation of sources*, Kluwer Law International, 1997, p. 33-37.

³ A. A. D'Amato, *The Concept of Custom in the International Law*, Cornell University Press, 1971, p. 70-71; 196-7.

From these and other situations one may say that, in fact, we can speak not about acquiescence, but about presumed acquiescence which is not an analytically useful concept.

Even more, there are some examples of state practice that calls into question the "doctrine of agreement". First, it must be mentioned the situation of new states which have never been asked to consent to existing rules of law. Secondly, the same is the result as regards the states acquiring for the first time an access to a certain activity. Another example is the fact that states rights and duties in international law are not "impaired by changes in law, government or constitutional structure, no matter how violent, at least as long as the core of its territory and population remain the same".

2.3 Other Hypothesis

A third set of theories on *opinio iuris* concerns the formation of international custom by the inclusion or repetition of rules of law in a number of bilateral or multilateral conventions.

A final category of theories equates *opinio iuris* with "the shared expectations about the requirements of future decision".

These two final groups of theories are either self-contradictory or so broad as to be functionally useless.

3. Related Problems as Concerns the Custom- Formation

Some related problems to the custom theory concern either the first or the second element of it.

As concerns the material element, one may see that there are different opinions. Some writers consider that only acts and not statements count as state practice, other argue that any instance of state behaviour - including acts, omissions, statements, treaty ratification, negotiating positions (as reflected in *travaux préparatoires*) and votes for or against, resolutions and declarations - may constitute state practice for the purposes of customary international law. This more inclusive approach has been implicitly endorsed by ICJ, in 1950 Asylum case where "official views" and "treaty ratification" were taken in consideration in determining that a "constant and uniform usage" did not exist (ICJ Reports 265, p 277). One may say that the same is the International Law Association's view as regards state practice. As it was pointed out at the London Conference (2000), both verbal and physical acts, as long as they are public, count as state

practice. They are both forms of conduct, the distinction is the weight to be given to them.

Another related issue is whose conduct¹⁾ may count as state practice. On the one hand, the practice of the executive, legislative and judicial organs of the state is to be considered as state practice, but on the other hand, the acts of individuals, corporations, territorial governmental entities which do not enjoy separate legal personality do not, as such, constitute state practice unless carried out on behalf of the state or adopted (ratified) by it. Although international courts and tribunals derive their authority from states, it is not appropriate to regard their decisions as a form of state practice.

¹ Final Report of the Committee on Formation of Customary General International Law of the International Law Association - London Conference (2000), p. 13-19.

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